NO. 48471-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

XAVIER CERVANTES
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR LEWIS COUNTY

The Honorable Nelson Hunt, Judge

BRIEF OF APPELLANT

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2. The state failed to prove that Cervantes intended to deprive the owner of her vehicle.

3. The police arrested Cervantes without reasonable articulable suspicion of criminal activity or probable cause.

4. Trial counsel was ineffective to Cervantes prejudice by failing to challenge the warrantless arrest.

5. Trial counsel was ineffective to Cervantes prejudice by failing to challenge the police reliance on an invalid report of a stolen car report.

6. The trial Court abused its discretion by imposing Legal Financial Obligations.

7. The Court of Appeals Should Not Impose Costs on Appeal.

Issues Presented on Appeal

1. Did the state fail to prove that the vehicle in Cervantes possession was stolen when the owner did not believe

the car was stolen?

2. Did the state fail to prove that Cervantes intended to deprive the owner of her vehicle when he simply borrowed it without asking, as he had done in the past?

3. Did the police arrest Cervantes without reasonable articulable suspicion of criminal activity or probable cause, in reliance on an invalid stolen car report?

4. Was trial counsel ineffective to Cervantes prejudice by failing to challenge the warrantless arrest?

5. Was trial counsel ineffective to Cervantes prejudice by failing to challenge the police reliance on an invalid report of a stolen car report?

6. Did the trial Court abuse its discretion by imposing Legal Financial Obligations when Cervantes is indigent?

7. Will this Court decide not to impose costs on appeal because Cervantes is indigent?

B. STATEMENT OF THE CASE

Xavier Cervantes was charged and convicted of possession of a stolen car. CP 1-2, 30-41. Austyn Smith (A.S.) 17 year old daughter to Veronica Smith called the police to report her mother's car taken

without her permission. A.S. suspected that her uncle, Xavier Cervantes took the car. A.S. lives with her uncle Cervantes, her mother and grandparents. Cervantes often works on his sister Veronica Smith's car, the car A.S. reported stolen. RP 30, 71-72, 75.

Veronica Smith allows Cervantes to work on the car and to use it when he works on it, but not otherwise, unless he asks. RP 83-84, 87. Victoria Smith's mother, father, brother and daughter drove the car but the grandmother and A.S. were the primary drivers. RP 84. Victoria Smith did not give Cervantes permission to drive the car on October 10 or 11, 2016. RP 84-85. Ms. Smith never believed the car was stolen and knew that it would be returned. RP 87, 93-94.

A.S. did not own the car, did not have control over the car and was only one of several people generally allowed to drive the car. RP 84, 88. When the car was taken, A.S. was not allowed to drive the car because her mother believed it was too dangerous to drive. RP 77. Veronica Smith, Cervantes sister and A.S.'s mother owns the car. RP 76, 88.

Without her mother's permission, A.S. called the police to report the car stolen. RP 75. Officer Curtis Spahn received a dispatch of a stolen Red Honda and spoke with A.S. RP 30 Spahn learned that

Victoria Smith owned the car, but he never called her to ask if the car was stolen. RP 31-32.

Officer Thornburg was in Stan Hedwall Park where many people park when he observed the Red Honda. RP 61. Thornburg ran a license plate check because there had been many reports of stolen Hondas and the car looked unoccupied. RP 68. The car report came back stolen. RP 62.

Thornburg did not know or believe this car was stolen before running the license plate check. RP 69. Thornburg soon realized that the Honda was occupied and that Cervantes was sitting in a reclined position. RP 61, 64. Thornburg executed a felony stop. RP 63-64. Cervantes complied with all requests. RP 64, 69.

Officer Spahn arrived after Cervantes was handcuffed and seated in Thornburg's patrol car. RP 32-33, 64. Cervantes complied with the request to exit the car and lie on the ground. RP 64-65. After being advised of his rights, Cervantes explained that his sister owned the car he borrowed late the night before and that he took the car to help his girlfriend who needed roadside assistance. RP 65-67, 97-98.

Contrary to her mother and D.O.L., A.S. testified that "her" car was missing and that she was the primary driver. RP 31, 32, 72-74,

84. A.S. testified that she did not give her uncle permission to use "her" car. RP 75. When the car was taken, A.S. was asleep. RP 76. A.S. also testified that Cervantes had taken her car both with and without permission in the past. RP 77.

A.S. admitted that Cervantes worked on the car and had taken out the ignition and replaced it without damage on prior occasions. RP 77-79. On October 10, 11, 2015, Cervantes removed the ignition to use the car and replaced it without damage. RP 85. There was never any expense to Veronica Smith. RP 85. The car was generally in bad repair and Cervantes was always working on the car with his father. RP 79.

Ms. Smith asked Cervantes to ask before taking the car. RP 86. Cervantes apologized for borrowing the car without permission while Ms. Smith was at work. RP 86. Ms. Smith never considered the car stolen. RP 87. Ms. Smith reiterated that A.S. does not own or insure the car and that Ms. Smith never reported it stolen. RP 93. Ms. Smith knew that her car would be returned because Cervantes always returned the car. RP 93-94.

Cervantes did not ask permission to take the car because he did not want to wake his nice and his sister was working. RP 98. The

repair work on his girlfriend's car took longer than expected so Cervantes stayed overnight and was ten minutes away from home, in the process of returning the car when the police arrested him. RP 98-102, 106-07. Cervantes stopped at the park because the car was shaking and to take a brief rest. RP 107.

Cervantes knows how to remove the ignition to start the car without keys and to replace the ignition without any damage. RP 99-100. Cervantes borrowed his sister's car and was returning it when he was arrested. RP 104, 107.

Over defense objection that Cervantes is indigent, the trial court imposed discretionary LFO's of $1200 in attorney fees and $200 filing fee. RP 160-64. The court imposed mandatory fees as follows: DNA, $100, and $500 crime victim's fee. RP 159-60. The court ordered Cervantes to begin paying within 60 days of sentencing during his 43 month sentence. RP 163-64. Cervantes was indigent for trial and is indigent on appeal. CP 44-45.

This timely appeal follows. CP 43.

C. ARGUMENT

1. THE STATE FAILED TO PROVE THE ESSENTIAL ELEMENTS OF POSSESSION OF A STOLEN VEHICLE.

The state charged Cervantes with the following language: Cervantes "did possess a motor vehicle knowing the motor vehicle was stolen, and did withhold or appropriate the property to the use of a person other than the true owner…". CP 1-2. Possession of stolen vehicle under RCW 9A.56.068(1) is defined as follows:

> A person is guilty of possession of a stolen vehicle if he or she possess [possesses] a stolen motor vehicle.

Id.

The to-convict jury instruction # 5 provides in relevant part

> To convict the defendant of the crime of possessing a stolen motor vehicle, each of the following elements of the crime must be proved beyond a reasonable doubt: …… **the defendant knowingly received, retained, possessed, or concealed** a stolen motor vehicle; two, that **the defendant acted with knowledge that the motor vehicle had been stolen; three, that the defendant withheld or appropriated** the motor vehicle to the use of someone other than the true owner or person entitled thereto;…..

(Emphasis added) CP 9-24.

RCW 9A.56.140(1) defines possession of stolen property as follows:

> "Possessing stolen property" means knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto.

Id. RCW 9A.56.068(1) implicitly incorporates RCW 9A. 56.140(1)'s terms and "provide[s] the mens rea element of the offense of possession of a stolen motor vehicle." *State v. Satterwaite*, 186 Wn.App. 359, 364, 344 P.3d 738 (2015); 11A WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 77.21 at 178 (3d ed. 2008); *State v. Hayes*, 164 Wn.App. 459, 479-80, 262 P.3d 538 (2011).

When "receive, retain, possess, conceal, or dispose of stolen property" are listed in the to-convict instruction, the state is required to prove beyond a reasonable doubt, with unanimity, each of these elements listed in that charging document. *Hayes*, 164 Wn.App. at 478-81 (citing *State v. Lillard*, 122 Wn.App. 422, 434-35, 93 P.3d 969 (2004)).

Here, the state was required to prove the elements listed in the to-convict instruction set forth in jury instruction #5. *Lillard*, 122 Wn.App. at 434-35. The state did not however present any evidence that Cervantes "received or disposed of a motor vehicle he knew to be stolen, and the state presented insufficient evidence that Cervantes retained or possessed the car, knowing that it was stolen.

Cervantes borrowed his sister's car and did not ask permission because she was at work and the rest of the family was asleep. Cervantes took the car to assist his girlfriend and was en route to return the car when the police located Cervantes. The state did not prove that Cervantes received, retained, possessed, concealed, or disposed of his sister's car, a car he worked on and that was not in use at the time he borrowed it. The state also failed to prove that Cervantes withheld or appropriated the car.

Cervantes did not steal his sister's car, and just because his niece called the police without permission from her mother does not convert the borrowed car into a stolen car. The owner never considered her car stolen. The facts taken in the light most favorable to the state do not prove beyond a reasonable doubt the crime of possession of a stolen motor vehicle.

The state did not prove the charge against Cervantes and did not propose a lesser offense. Accordingly, this Court must remand for reversal with prejudice.

2. CERVANTES WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL COUNSEL DID NOT MOVE TO SUPPRESS THE ILLEGAL ARREST.

The standard of review for a challenge to the effective assistance of counsel is de novo. *State v. Cross,* 156 Wn.2d 580, 605, 132 P.3d 80, *cert. denied,* 549 U.S. 1022 (2006). A defendant has an absolute right to effective assistance of counsel in criminal proceedings. *State v. Grier*, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011); *Strickland v. Washington,* 466 U.S. 668, 684–86, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Sixth Amendment to the U.S. Constitution and Washington article I, section 22.

While counsel is presumed effective, this presumption is overcome where the defendant establishes that (1) defense counsel's representation was deficient; falling below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defendant. *State v. Sutherby,* 165 Wn.2d 870, 883, 204 P.3d 916 (2009); *State v. McFarland,* 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

More than the mere presence of an attorney is required. *State v. Hawkins,* 157 Wn.App. 739, 747, 238 P.3d 1226 (2010), *review denied,* 171 Wn.2d 1013 (2011). A deficient performance claim can be based on a strategy or tactic when the defendant rebuts the presumption of reasonable performance by demonstrating that "there

is no conceivable legitimate tactic explaining counsel's performance." *Grier*, 171 Wn.2d at 33; citing, *State v. Reichenbach,* 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. Aho,* 137 Wn.2d 736, 745–46, 975 P.2d 512 (1999). Trial strategies and tactics are thus **not** immune from attack on grounds of ineffective assistance of counsel. "The relevant question is not whether counsel's choices were strategic, but whether they were reasonable." *Roe v. Flores–Ortega,* 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000) (finding that the failure to consult with a client about the possibility of appeal is usually unreasonable).

Prejudice is established if the defendant can show that "there is a reasonable probability that, but for counsel's unprofessional errors, the outcome of the proceeding would have been different." *State v. Nichols,* 161 Wn.2d 1, 8, 162 P.3d 1122 (2007). If a party fails to satisfy one element, a reviewing court need not consider both *Strickland* prongs. *State v. Foster,* 140 Wn.App. 266, 273, 166 P.3d 726, *review denied,* 162 Wn.2d 1007 (2007).

a. Warrantless Search, Seizure and Arrest.

As a general rule, warrantless searches and seizures are per se unreasonable. *State v. Z.U.E.*, 183 Wn.2d 610, 617, 352 P.3d 796

(2015). However, under the *Terry v. Ohio*, 392 U.S. 1, 88, S.Ct. 1868, 20 L.Ed.2d 899 (1968), exception, police may conduct a warrantless investigatory stop of an individual where the officer has a well-founded suspicion of criminal activity based on specific and articulable facts. *State v. Acrey*, 148 Wn.2d 738, 746, 64 P.3d 594 (2003). Our Supreme Court has defined "articulable suspicion" as "a substantial possibility that criminal conduct has occurred or is about to occur." *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986) (citing 3 Wayne R. LaFave SEARCH AND SEIZURE § 9.2 at 65 (1978)).

In *Reichenbach*, the Supreme Court held that trial counsel's performance was deficient where the attorney failed to challenge the admission of a baggie of methamphetamine "despite serious questions about the validity of the warrant upon which the search was based." *Reichenbach,* 153 Wn.2d at 130-131. The Court held that counsel's failure to challenge the search based upon an invalid warrant cannot be explained as a legitimate tactic. Id.

In *State v. Hamilton,* 179 Wn.App. 870, 320 P.3d 142 (2014), this Court held that counsel's performance was deficient and prejudicial where counsel failed to move to suppress an illegal search of a purse. *Hamilton*, 179 Wn.App. at 882. Specifically, this Court held

that there was " no conceivable legitimate tactical reason explaining counsel's failure to move to suppress crucial evidence based on an unlawful search of the purse." Id.

Similarly, in *State v. Saunders*, 91 Wn. App. 575, 958 P.2d 364 (1998), this Court reversed a conviction for prejudicial ineffective assistance of counsel where defense counsel offered evidence of a prior conviction for possession of illegal drugs that would not have been admissible at trial if introduced by the state. *Saunders*, 91 Wn. App. at 578-581. *Saunders*, 91 Wn. App. at 578-579, quoting, *Hendrickson,* 129 W.2d at 78.

These cases demonstrate that the failure to challenge an illegal search and seizure cannot be considered tactical when the potential for success exists to defeat the state's charges. *Reichenbach* involved an invalid warrant, *Hamilton* involved a failure to challenge an illegal search of a purse and *Saunders* involved presentation of prejudicial, similar act evidence that was not admissible in trial. *Reichenbach,* 153 Wn.2d at 130-131; *Hamilton*, 179 Wn.App. at 882; *Saunders*, 91 Wn. App. at 578-579.

Here, the police relied on a stolen car report and a conversation with a teenager who was one of many drivers of the car,

but not the owner. Had the police questioned the owner, they would have learned that the car was not stolen, but rather taken without permission with the expectation that the car would be returned. RP 31-32, 93-94. Had counsel moved to suppress the stolen car report as a basis for the arrest, the trial court would have granted the motion, because there was no valid legal basis believe the car was stolen.

b. Report of Stolen Car Is Not An Exception To the Warrant Requirement.

For the police to be able to rely on a report of a stolen car, there must be some indicia of reliability beyond just a Washington Criminal Identification Center (WACIC) report. *State v. O'Cain*, 108 Wn.App. 542, 552, 31 P.3d 733 (2001) (citing *State v. Sandholm*, 96 Wn.App. 846, 848, 980 P.2d 1292 (1999)). Without other evidence the State is required "to legitimize the arrest by showing that the police or police agency that caused the vehicle to be listed as stolen by WACIC had probable cause to arrest the person found driving it." Id. The state bears the burden of establishing the reliability of the caller or WACIC information. *O'Cain,* 108 Wn. App. at 555

For example, when the defense challenges a warrantless stop based on "a police dispatch that a particular vehicle has been

reported stolen…, " the State cannot justify the seizure merely by showing that the officer making the stop did so because he or she received the dispatch-". *O'Cain*, 108 Wn.App. at 552 (citing *Sandholm*, 96 Wn.App. at 848.

The State's burden to establish reliability of its dispatches regarding stolen automobiles is not difficult. For example, the state can easily satisfy its burden by presenting testimony regarding the procedures utilized by WACIC. *O'Cain,* 108 Wn.App at 556. *O'Cain*, 108 Wn.App. at 555-56 (quoting, *State v. Sandholm*, 98 Wn.App. 846, 848, 980 P.2d 1292 (1999)).

In *O'Cain*, the police relied on a stolen car report from a car dealership. *O'Cain,* 108 Wn. App. at 553. The officer who relied on the report did not investigate the reliability of the report which was after-the-fact confirmed to be reliable. Id. The Court held that the after-the-fact investigation of the reliability of the report did not confirm that the car was actually stolen. *O'Cain,* 108 Wn. App. at 553 (citing *Florida v. J.L.*, 529 U.S. 266, 120 S.Ct. 1375, 146 L.Ed.2d 254 (2000)). In J.L., the Supreme Court rejected an after-the-fact argument. *J.L.*, 529 U.S. at 268-69.

In *O'Cain*, the caller who reported the stolen car was not

identified so the police could not determine the knowledge or reliability of the caller. *O'Cain,* 108 Wn. App. at 554. The Court held that "the fact that the stolen-vehicle report in this case (probably) was based on information stored in a computer, be it at WACIC or at King County, cannot provide the missing link to the State's case." *O'Cain,* 108 Wn. App. at 555.

In *O'Cain*, the Court reversed the suppression ruling , vacated the conviction and remanded for further proceedings- likely dismissal with prejudice because the state's case rested on the invalid stolen car report. *O'Cain,* 108 Wn.App at 546-556

Here, the stolen car report was also invalid. The teenager caller was identified, but she was not the owner or authorized to report the car stolen. Rather, her mother was the owner and never considered the car stolen. Had officer Thornburg or any of the other officers called the owner of the car to confirm that it was stolen, they would have realized that the car was not stolen.

Just as in *O'Cain*, here, the failure to adequately investigate the reliability of the teenage report which turned out to be erroneous, was inadequate to provide the necessary reliability for the computer stored, stolen car report. Trial counsel did not have any tactical

reasons not to move to suppress the only evidence of the crime when that evidence would have been suppressed because the police did not have a warrant, there were no exceptions to the warrant requirement or any authority of law to arrest Cervantes. *Reichenbach,* 153 Wn.2d at 130-131; *Saunders*, 91 Wn. App. at 578-579. Accordingly, this Court should invalidate the arrest and remand for dismissal.

3. THIS COURT SHOULD NOT IMPOSE APPELLATE COSTS ON APPEAL.

This Court has discretion not to allow an award of appellate costs if the State substantially prevails on appeal. RCW 10.73.160(1); *State v. Nolan,* 141 Wn.2d 620, 626, 8 P.3d 300 (2000); *State v. Sinclair*, ___Wn.App.___, 376 P.3d 612, 617 (2016).

The defendant's inability to pay appellate costs is an important consideration to take into account in deciding whether to disallow costs. *Sinclair*, 376 P.3d 616. Here, the trial court found that Cervantes is indigent and does not have the ability to pay legal financial obligations. CP 44-45. This Court should exercise its discretion and disallow appellate costs should the State substantially prevail.

The Rules of Appellate Procedure allow the State to request

appellate costs if it substantially prevails. RAP 14.2. A "commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, *unless the appellate court directs otherwise in its decision terminating review.*" RAP 14.2 (emphasis added). In interpreting this rule, our Supreme Court held that it allows for the appellate court itself to decide whether costs should be allowed:

> Once it is determined that the State is the substantially prevailing party, *RAP 14.2 affords the appellate court latitude in determining if costs should be allowed*; use of the word "will" in the first sentence appears to remove any discretion from the operation of RAP 14.2 with respect to the commissioner or clerk, but *that rule allows for the appellate court to direct otherwise in its decision*.

Nolan, 141 Wn.2d at 626 (emphases added).

Likewise, the controlling statute provides that the appellate court has discretion to disallow an award of appellate costs. RCW 10.73.160(1) states, "[t]he court of appeals, supreme court, and superior courts *may* require an adult offender convicted of an offense to pay appellate costs." (emphasis added). In *Sinclair*, this Court recently affirmed that the statute provides the appellate court with discretion to deny appellate costs, which the Court should exercise in

appropriate cases. *Sinclair*, 376 P.3d at 615-16. A defendant should not be forced to seek a remission hearing in the trial court, as the availability of such a hearing "cannot displace the court's obligation to exercise discretion when properly requested to do so." Id.

Moreover, the issue of costs should be decided at the appellate court level rather than remanding to the trial court to make an individualized finding regarding the defendant's ability to pay, as remand to the trial court not only "delegate[s] the issue of appellate costs away from the court that is assigned to exercise discretion, it would also potentially be expensive and time-consuming for courts and parties." *Id.*.

Thus, "it is appropriate for this Court to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellate brief." *Sinclair*, 376 P.3d at 616. Under RAP 14.2, the Court should exercise its discretion in a decision terminating review. ." *Sinclair*, 376 P.3d at 615.

The Court should deny an award of appellate costs to the State in a criminal case if the defendant is indigent and lacks the ability to pay. *Sinclair*, 376 P.3d at 615-16. The imposition of costs against indigent defendants raises problems that are well documented, such

as increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration. *Sinclair*, 376 P.3d at 617 (citing *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015)). "It is entirely appropriate for an appellate court to be mindful of these concerns." *Sinclair*, 376 P.3d at 617.

In *Sinclair*, the trial court entered an order authorizing Sinclair to appeal in forma pauperis and to have appointment of counsel and preparation of the record at State expense, finding Sinclair was "unable by reason of poverty to pay for any of the expenses of appellate review," and "the defendant cannot contribute anything toward the costs of appellate review." *Sinclair*, 376 P.3d at 617. Given Sinclair's poverty, combined with his advanced age and lengthy prison sentence, there was no realistic possibility he would be able to pay appellate costs. *Sinclair*, 376 P.3d at 618. Accordingly, the Court ordered that appellate costs not be awarded. Id.

Similarly here, Cervantes is indigent and lacks an ability to pay. He is 38 years old and sentenced to 43 months of incarceration. CP 30-41. During sentencing, the trial court imposed discretionary legal financial obligations, finding the Cervantes indigent but "able bodied". CP 44-45; RP 160-64. The court also entered an order authorizing

Cervantes to appeal in forma pauperis, finding the Cervantes indigent CP 44-45. This finding is supported by the record. RP 160. Because Cervantes is indigent and incarcerated, this Court should exercise its discretion to reach a just and equitable result and direct that no appellate costs be allowed should the State substantially prevail.

4. TRIAL COURT ABUSED DISCRETION BY IMPOSING DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS ON INDIGENT CERVANTES.

The trial court improperly imposed Legal Financial Obligations ("LFO's"). RCW 10.01.160(3) provides:

> The court shall not order a defendant to pay costs unless the defendantis or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financialresources of the defendant and the nature of the burden that payment of costs will impose.

Our State Supreme Court recently held that under RAP 2.5(a) "[e]ach appellate court must make its own decision to accept discretionary review". *State v. Blazina*, 182 Wn.2d 827, 831, 835, 344 P.3d 680 (2015). Here, Cervantes challenged the imposition of LFO's. RP 160.

The Court in *Blazina,* recognized the "national and local

cries for reform of broken LFO systems demand that the appellate courts exercise discretion and reach the merits of the LFO issues." *State v. Blazina,* 182 Wn.2d at 835 (citations omitted).

a. The Trial Court Imposed LFO's In Violation of RCW 10.01.160(3) and *State v. Blazina*.

While Cervantes does not dispute the amounts listed and identified in the cost bill, he does object to the imposition of costs in this case. RCW 10.01.160(3) mandates that "[t]he court *shall not* order a defendant to pay costs unless the defendant is or will be able to pay them." RCW 10.01.160(3) (emphasis added by *Blazina*). *Blazina*, 182 Wn.2d at 838. To determine the amount and method for paying the costs, "the court *shall* take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose." *Id.* (emphasis added) by *Blazina*. This means that the trial court:

> must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry. The record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay. Within this inquiry, the court must also consider important factors, as amici suggest, such as incarceration

> and a defendant's other debts, including restitution, when determining a defendant's ability to pay.

Blazina, 182 Wn.2d at 838.

The Court in *Blazina* also recommended reliance on GR 34 for guidance in determining when to waive fees. For example, if a person meets the indigency requirements under CR 34 "courts should seriously question that person's ability to pay LFOs." ID.

Here, the trial court determined that even though Cervantes had no income and only debt, that he could start paying costs 60 days after beginning his 43 month period of incarceration because he is "able bodied". RP 160-64.

This determination does not support a finding that Cervantes has the ability to pay the discretionary LFO's in the amount of $1400. CP 44-45; RP 163. This Court must vacate the discretionary LFO's in the amount of $1400 because the trial court did not establish with adequate evidence that indigent, incarcerated Cervantes had the ability to pay. RCW 10. 01.1670(3); *Blazina, supra.*

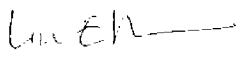
D. CONCLUSION

Mr. Cervantes respectfully requests this Court reverse and

remand for dismissal with prejudice based on insufficient evidence and based on ineffective assistance of counsel because retrial would require suppression of the only evidence of a crime. IF this Court does not reverse or remand, Mr. Cervantes also requests this Court vacate the imposition of discretionary LFO's.

DATED this 7th day of June 2016

Respectfully submitted,



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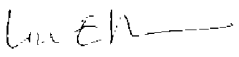

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